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In

The Supreme Court

of the United States

OCTOBER TERM, 1954

No. 631

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Petitioner,

vs.

UNITED TRUCK LINES, INC.,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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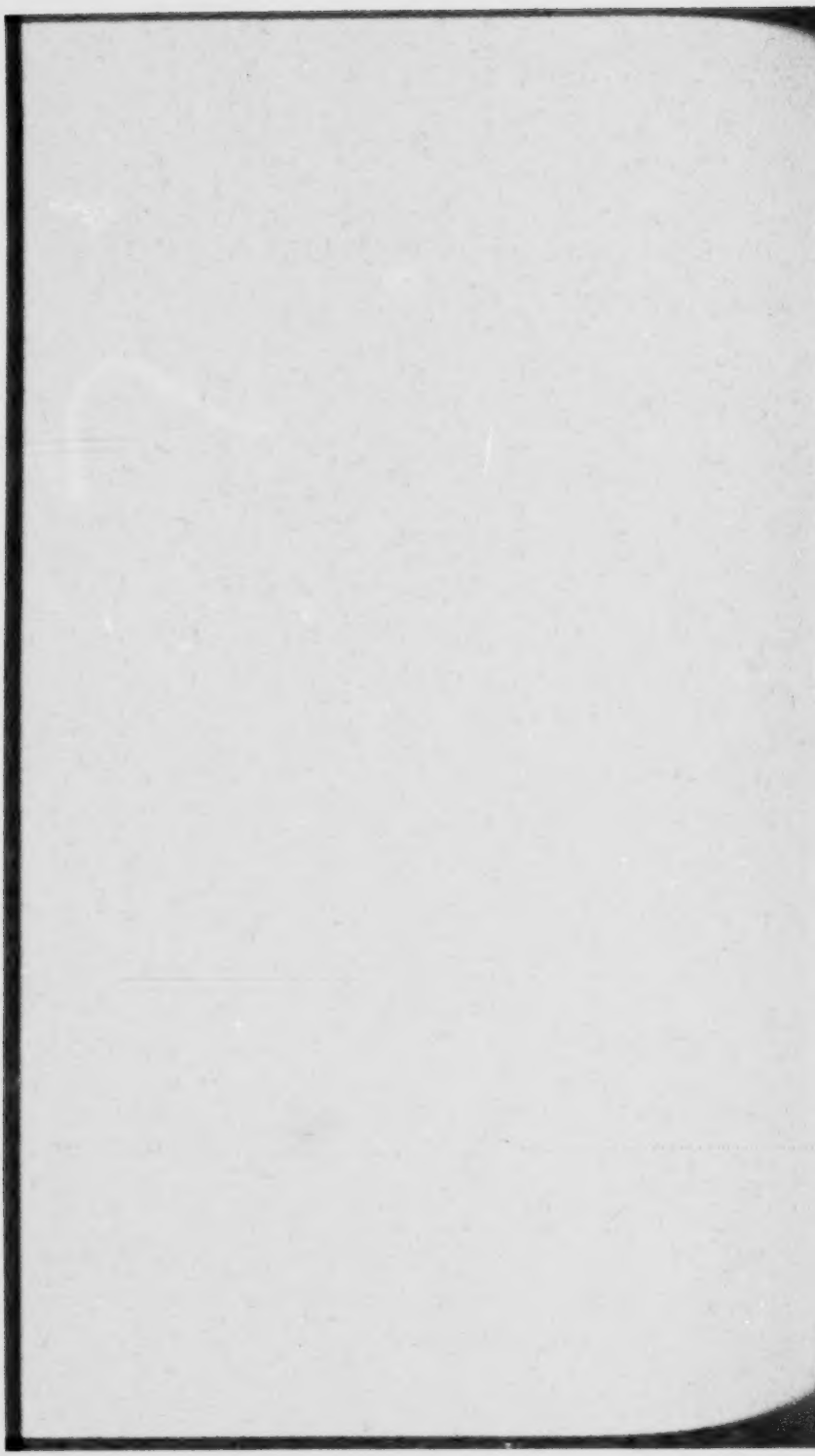

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To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner, Consolidated Freightways, Inc.,[1] respectfully prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Ninth Circuit, entered in the above entitled case in the Court of Appeals on December 6, 1954.

Opinions Below

The oral opinion of the District Court for the District of Oregon is unreported, and is printed in Appendix A hereto, *infra*

[1] hereinafter referred to as "petitioner".

p. 19. The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, p. 23 is reported in 216 F. (2d) 543.

Jurisdiction

The Judgment on Mandate of the Court of Appeals was entered in the District Court December 23, 1954. Prior thereto on October 19, 1954, the Judgment of the District Court was affirmed by the Court of Appeals (Tr[2] 41). Thereafter, within the time allowed by the Court of Appeals, petitioner filed a petition for rehearing which was denied by the Court of Appeals December 6, 1954 (Tr. 42). That petition having been filed in time (Tr. 42), this Court has jurisdiction to grant the Writ under 28 U.S.C. Section 2101.

Question Presented

Does a complaint specifically invoking a district court's jurisdiction under an Act of Congress regulating commerce (28 U.S.C. Sec. 1337) which seeks money damages and alleges that defendant violated the Federal Motor Carrier Act (Interstate Commerce Act, Part II, 49 U.S.C. Sec. 301 et. seq., particularly Sec. 306(a)(1)) by transporting property for hire over an interstate highway thereby diverting revenues from plaintiff which had the required authority to operate over the highway while defendant did not, raise a Federal question in the absence of diversity of citizenship?

Statutes Involved

The statutory provisions involved are the Interstate Commerce Act, Part I, Sections 8, 9 and 22 (49 U.S.C. Secs. 8, 9, 22); Interstate Commerce Act, Part II, Sections 301, 306(a)(1), 307(a)

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[2] References to "Tr." herein refer to pages of the original transcript of record of proceedings in the Court of Appeals which is on file in this Court. That transcript itself includes as pp. 1-29 thereof the record as printed for the use of the Court of Appeals. Rule 21(1), (4), Supreme Court of the United States.

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and (b) and 317(b) (49 U.S.C. Secs. 301, 306(a)(1), 307(a) and (b and 317(b); Section 1 Hepburn Act of 1906 (34 Stat. 584) (now incorporated in 49 U.S.C. Sec. 1(4)); and 28 U.S.C. Sections 1331 and 1337. They are printed in Appendix B hereto, *infra* p. 33.

Statement of the Case

Petitioner's complaint before the District Court alleged that: (1) petitioner and respondent are motor carriers subject in their interstate operations to the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act (Tr. 3); (2) petitioner transported property for compensation interstate over a designated highway by express permission of the Interstate Commerce Commission obtained as required by law (Tr. 4); respondent transported property for compensation interstate over the same highway without such permission (Tr. 5); such unlawful operations of respondent were directly competitive with petitioner's operations and resulted in a diversion of traffic and income from petitioner so that petitioner was entitled to money damages for "such illegal operations" (Tr. 5-6).

Petitioner and respondent are Washington corporations. In view of the non-diversity, respondent challenged the jurisdiction of the District Court over the subject matter. It did so by Motion to Dismiss claiming no federal question was involved (Tr. 13). The District Court granted the motion and ordered a dismissal of the complaint for want of federal jurisdiction (Tr. 20). Though the District Court's Oral Opinion (Tr. 14-19) accurately summarized the complaint, correctly assumed that the record before it conceded the violation of the Federal Motor Carrier Act, noted that petitioner was relying on 28 U.S.C. Sec. 1337 which gives the district courts jurisdiction of any civil action arising under any Act of Congress regulating commerce, it nevertheless ordered the dismissal. It did so on the ground that the cause of action was not based upon a federal statutory violation, but was a common law action which could not be asserted in a federal

court in the absence of diversity. The District Court so held even though 49 U.S.C. Sec. 317(b) (which it cited) specifically reserves common law remedies as a part of the Federal Motor Carrier Act. In spite of this specific reservation, the District Court disposed of the common law point on the ground (Tr. 16-18) that it was not derived from federal law.

On appeal, the Court of Appeals for the Ninth Circuit affirmed. Briefly stated, it held: (1) at most petitioner's complaint involved Federal "privileges" not "rights", a distinction which the Court of Appeals thought made inapplicable the long settled rule of this Court that invaded Federal "rights" may be protected by private suits for money damages even where (as here) the statute confers no such cause of action (Tr. 36-7); (2) after holding that petitioner was suing on a common law cause of action, that the statutory reservation of common law remedies in the Federal Motor Carrier Act did not permit an action in a federal court (Tr. 38-40) in the absence of diversity; and (3) inapplicable the well settled rule of the Court of Appeals for the Ninth Circuit (and other Courts of Appeals) that where one section of a statute provides for money damages for its violation, recovery of money may be had for violation of other sections which do not provide for money damages for their violation (Tr. 33-36).

Basis for the District Court's Jurisdiction

As we have tried to show in our Statement of the Case, the sole question before the Courts below and this Court is whether the complaint raises a federal question in the absence of diversity. As this Court has often held, the text of the complaint governs. *The Fair* v. *Kohler Die Co.*, 228 U.S. 22. Our view is that the complaint here (Tr. 3-6) relies on a violation of the Federal Motor Carrier Act; indeed, it mentions no other law as its theory of liability. Moreover, the complaint expressly relies on 28

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U.S.C. Sec. 1337 which gives the district courts original jurisdiction of civil actions arising under Acts of Congress regulating commerce (Tr. 4). Both of the lower Courts held, however, that petitioner's complaint states a common law cause of action. If that be correct, the District Court has jurisdiction because common law remedies are specifically reserved by and incorporated in the Federal Motor Carrier Act. Accordingly, the District Court has jurisdiction of this case, but has erroneously declined jurisdiction. And the Court of Appeals has erroneously affirmed.

Reasons for Allowance of the Writ

The opinion on which the Court of Appeals' judgment is based decides a Federal question in conflict with applicable decisions of this Court and has decided an important question of Federal law which has not been but should be, decided by this Court.

For many years, most recently in *Bell* v. *Hood*, 327 U.S. 678, this Court has been of the opinion that when federal rights have been invaded and a federal statute provides for a general right to sue for such invasion, a federal question is presented by a complaint seeking money damages irrespective of diversity even though the federal right is silent as to money damages for its violation. The rule was stated this way in *Bell* v. *Hood:*

> "* * * where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. *And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.* Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. Sec. 41(1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sus-

> tained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction." (327 U.S. 678 at pp. 684-5, italics added.)

The principle of *Bell* v. *Hood* is not new. As this Court pointed out at footnote 7 on page 684 of the *Bell* opinion, earlier cases such as *Dooley* v. *United States,* 182 U.S. 222, had similarly held. In turn, the *Dooley* opinion (at p. 228) relied on *United States* v. *Kaufman,* 96 U.S. 567, decided by this Court in 1877. In concurring in *Bell* v. *Hood,* Mr. Justice Reed (at p. 685) mentions further cases such as *Barron* v. *Baltimore,* 7 Pet. 243, and *Burdeau* v. *McDowell,* 256 U.S. 465, 475.

The Court of Appeals' opinion in refusing to follow *Bell* v. *Hood,* said the present case involved only the *privileges* conferred by a grant of a certificate of public convenience and necessity by the Interstate Commerce Commission, not *rights* such as were involved in the *Bell* case (Tr. 36-7, italics the Court's). What the Court of Appeals was dealing with is the prohibition against interstate operation by motor carriers subject to federal regulation without the certificate of public convenience and necessity required by 49 U.S.C. Sec. 306(a)(1). Whether, as in this case, one who operates illegally without a certificate in competition with one who possesses a certificate is interfering with the legal operator's "privileges" or "rights" is, we think, beside the point. The illegal operator in any event is interfering with a certificate which is granted by authority of an Act of Congress. 49 U.S.C. Sec. 307(a). Protection of this certificate is the sole liability theory of the complaint. In the words of the *Bell* opinion, it forms ". . . . the sole basis of the relief sought." 327 U.S. at p. 683 (quoted but we think erroneously applied by the Court of Appeals, Tr. 37).

We think the Court of Appeals has wrongly decided that the complaint herein presents no federal question and in so doing

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has ruled in conflict with *Bell* v. *Hood.* Here petitioner relies upon the violation of a federal statute, namely, 49 U.S.C. Sec. 306(a)(1) and upon a "general right to sue," namely, 28 U.S.C. Sec. 1337. In the *Bell* case reliance was upon the Fourth and Fifth Amendments to the U. S. Constitution and upon 28 U.S.C. Sec. 1331.

In this case the principle of the *Bell* opinion is strongly reinforced by another principle. That principle is that if a statute is intended to protect lawful from unlawful competition, there is a right to damages whether or not the statute expressly confers such a right. *3 Restatement of Torts,* Sec. 710, p. 527, is in point:

> "Sec. 710. Engaging in Business in Violation of Legislative Enactment.
>
> One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,
>
> (a) one of the purposes of the enactment is to protect the other against unauthorized competition, and
> (b) the enactment does not negative such liability.
>
> "Comment:
>
> a. Nature of enactment. The rule stated in this Section is analagous to the rules stated in Secs. 286-288 concerning the liability for negligence resulting from the violation of a legislative enactment. Here, as there, whether the violation of the enactment creates civil liability depends upon the provisions and purposes of the enactment. If the enactment specifically provides for civil liability, the effect of a violation is clear. In the absence of such a specific provision, a legislative enactment may impose conditions upon one's entry into a business or occupation with no purpose to qualify the privilege to compete; or it may do so for the very purpose of limiting competition in the field. The

different situations are discussed in the following comments.

* * *

c. Non-exclusive franchises and licenses. [This is what petitioner has since Sec. 307(b) of 49 U.S.C. denies a certificate holder a proprietary or property right in the use of the public highways.] One purpose of an enactment may be to protect persons engaged in a particular business against unauthorized competition even though they do not have an exclusive franchise. An exclusive franchise clearly manifests a purpose to protect persons engaged in a specified business against unauthorized competition, but that purpose may appear in enactments containing no provisions for exclusive privileges. Thus legislation generally prohibits persons from engaging in a public utility business without first securing permission from the proper governmental authority. One of the objects of such legislation commonly is the prevention of so much competition as to cause loss to those engaged in the industry with resultant deterioration or disruption of the service. One of the factors commonly prescribed by statute for determining whether the permission to engage in the business is to be granted is the probable effect of the added competition upon the business of those already in the field. The effect of such legislation is thus in part to protect against unauthorized competition the persons engaged in business in conformity with the legislation."

The Interstate Commerce Commission and the Courts have uniformly construed the Act to accord protection from unauthorized competition. A recent case is *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, 39 (1948). There Brady had been granted a certificate of public convenience and necessity authorizing irregular-route operations between Iowa points, on the one hand, and St. Paul-Minneapolis, on the other. Having reason to believe that Brady was illegally converting the irregular-route authority into regular-route authority by (among other things) holding out daily service on published schedules,

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the Commission, on its own motion, began an investigation. As a result of such investigation, Brady was found to be operating an illegal regular-route operation and was ordered to cease and desist therefrom. In the course of its opinion leading to that result, the Commission said at p. 39 of 47 M.C.C.:

> ". . . The fundamental purpose underlying the certificate and permit requirements of the act, is the protection of existing carriers from unbridled and uncontrolled competition in the form of unneeded services which tend to instability in, and low standards of service. This purpose would not be furthered by conceding to irregular route carriers carte blanche right at their own will and whim to invade the field of others, merely because they happen to overlap territorially."

The *Brady* case was appealed and affirmed by a statutory three-judge federal district court. 80 F. Supp. 110. In the course of its opinion that Court said at p. 118:

> ". . . One of the underlying principles of regulation of utilities generally is that when the sovereignty assumes the power of regulation and requires the service and type of service which the regulatory authorities determine to be necessary and convenient in the public interest *then some measure of protection against indiscriminate and uncontrolled competition must be provided.*" (Emphasis supplied)

The *Brady* case was affirmed *per curiam* by this Court. 335 U. S. 875.

Since the *Brady* case clearly demonstrates that one of the purposes of the statute *was* the protection of lawful from unlawful competition, it follows that there is a right to damages in this case within the meaning of the *Restatement* excerpt even though the statute does not expressly confer such right. Moreover, since the statute which has the purpose of protecting lawful

competition is a *federal* statute, it follows that there is a *federal question* presented by the complaint.

Our next reason for allowance of the Writ involves the assumption that the District Court was right in its generalization that petitioner relies on the common law (Tr. 15), or that the Court of Appeals was right in holding that petitioner relies on the particular common law theory of unfair competition (Tr. 37-38, 39-40). On that assumption both Courts have decided a federal question in conflict with decisions of this Court. In passing, though, we want to emphasize that in arriving at the results they did, both Courts below cited petitioner's reliance on *3 Restatement of Torts, Sec. 710,* which, as noted above, starts as follows:

> "Section 710. Engaging in Business in Violation of Legislative Enactment. . . ."

We thought this *Restatement* citation supported petitioner's reliance upon respondent's violation of the Federal Motor Carrier Act. The lower Courts thought it meant petitioner was relying on the common law and they so held. What follows shows that, if the lower Courts were right, petitioner has raised a federal question.

Nearly forty years ago this Court laid down the broad proposition that since Section 22 of Part I of the Interstate Commerce Act (49 U.S.C. Sec. 22) reserves common law remedies, *a carrier which had breached any common law duty might be sued in either a state or federal court.* The leading case is *Penna. R. R. Co.* v. *Sonman Coal Co.,* 242 U. S. 120. That case involved a common law action for failure to deliver coal cars and came to this Court from the Supreme Court of Pennsylvania. True, the carrier had been held liable in a state, not a federal court. But this Court held it to have also been suable in a federal court as follows:

> "It is true that Secs. 8 and 9 deal with the redress of injuries resulting from violations of the act and give the per-

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son injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that Secs. 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for Sec. 22 contains this important provision: 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision of Sec. 22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446-447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is other wise made exclusive, *ibid.* 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule

but against its unequal and discriminatory application, no administrative question is presented and the claim *may be prosecuted in either a federal or a state court,* without any precedent action by the Commission *ibid* 131-132; and that, if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, *may be enforced in either a federal or a state court* without any preliminary finding by the Commission, and this *whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act, ibid.* 132-135; * * * (citing cases) (Italics added)

"Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in Sec. 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. *That duty arose from the common law* up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded *as merely adopting the common law rule.* * * *." (242 U.S. at pp. 123-126, italics added.)

As the above italics show, this Court in the *Sonman* case clearly held that the violation of a common law duty made available to the aggrieved person the Section 22 common law remedies in either a state or a *federal* Court. The *Abilene Cotton Oil* case referred to in the above quotation does not affect the principle;

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all it held was that Sec. 22 did not preserve such common law remedies as were inconsistent with the Act itself and that therefore a shipper might not attack a rate, rule or practice without prior resort to the I.C.C. The *Puritan Coal* case referred to in the quotation is also exactly in point here. There the shipper complained that the carrier's own rule for car allocation in time of shortage was discriminatorily applied. This Court said:

> "But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called upon to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. *Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal Courts.*" (237 U.S. at pp. 131-2, italics added.)

We recognize, of course, that this Court's view, as stated in the *Sonman* and *Puritan* cases, that the common law remedies reserved by Section 22 may be asserted in a *federal court* is dicta because the point in those cases was whether the remedies could be asserted in a state court. If those cases had been diversity of citizenship cases, it might well be urged that this Court's dicta mean little because, of course, the common law remedy could be asserted in a diversity case just because it was a diversity case. However, the fact is that both cases were *non-diversity cases* as is shown by Appendix C hereto which contains replicas of certified copies of plaintiff's pleadings in those cases on file in the Court of Appeals. As to the *Puritan* case, page 45 of Appendix C states that plaintiff and defendant are Pennsylvania corporations and page 50 states that defendant moved to dismiss and no answer was filed. Accordingly, non-diversity was conceded. As to the *Sonman* case, page 56 of Appendix C states that plaintiff is a Pennsylvania corporation and page 58 says that defendant is governed by the laws of that State. Appendix C, page 61, states

that defendant in the *Sonman* case moved to dismiss and no answer was filed. Thus non-diversity was conceded there too.

The significance of this Court's saying, even by way of dicta, in a non-diversity case that the common law remedies reserved by Sec. 22 might be asserted in a federal court is, we think, obvious. This Court was saying that Sec. 22 created a federal right and that a claim under Sec. 22 accordingly presented a federal question.

In 1935, long after this Court placed this construction upon Sec. 22, Congress amended the Interstate Commerce Act by adding Part II (the Federal Motor Carrier Act) thereof to regulate interstate motor carriers for the first time. In so doing it incorporated Section 22 by reference in Part II. Section 317(b) of 49 U.S.C. Obviously, Section 317(b) must have been placed in the Federal Motor Carrier Act for some purpose. This must have been to create a federal cause of action particularly since this Court had held nearly thirty years earlier that this was the exact effect of Sec. 22. Despite this background, both the District Court and the Court of Appeals refused to apply Section 317(b) after both held that petitioner's complaint states a common law cause of action.

The District Court's refusal to apply Section 317(b) was based upon this Court's opinions in *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476, and *Gully* v. *First National Bank*, 299 U.S. 109 (Tr. 16-17). Both of these cases hold that where an Act of Congress *permits* a tax levy by a state or territory, an action to collect those taxes under state law involves state created, not federal rights, and that the federal enabling act does not create a federal right. The *Puerto Rico* and *Gully* opinions do not apply here because Section 317(b) does not merely *permit* state legislation; it affirmatively reserves common remedies as part of a federal statute.

In also refusing to apply Section 317(b), the Court of Appeals discusses the facts of the *Sonman* case without mentioning it by

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name (Tr. 40) and incorrectly holds that the failure to furnish cars involved in the *Sonman* case was *not* a breach of a *common law duty,* but was a *statutory* violation, for which there was a statutory remedy provided in Secs. 8 and 9 of 49 U.S.C. Accordingly, the Court felt Section 317(b) was not involved (Tr. 39-40).

That the *Sonman* case involved the breach of a common law duty is very clear. The opening words of this Court's opinion point out that the cause of action started in 1903. 242 U.S. 120, 121. The *Sonman* complaint specifies that the time concerned was between April, 1903, and April, 1908. Appendix C hereto, page 56. Finally, neither the original Interstate Commerce Act of 1887 (24 Stat. 379) nor the 1889, 1891 and 1903 amendments (25 Stat. 855, 26 Stat. 743 and 32 Stat. 847) required carriers to furnish cars. That duty was first placed in the law by the June 29, 1906 amendment known as the Hepburn Act (34 Stat. 584). It read, so far as here material:

> "Sec. 1. * * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, * * *" (34 Stat. 584 near bottom of page).

Accordingly, if this Court agrees with both lower Courts that the complaint herein states a common law cause of action, it is obvious that the complaint raises a federal question.

We have seen that the results below decide federal questions in conflict with applicable decisions of this Court primarily, we think, as to the Court of Appeals because that Court refused to apply *Bell* v. *Hood,* especially as reinforced (this Petition, pp. 7-10) by the principle of the *Restatement* and the *Brady* case. As to both Courts, conflict with decisions of this Court is obvious if those Courts were right in concluding petitioner was proceeding upon the common law.

Not only do the results below present the conflicts mentioned; the conflicts themselves point up the fact that an important question of federal law has not yet been, but should be, decided by this Court. That question is whether Congress, in enacting the Federal Motor Carrier Act, intended to permit federal private litigation for violations of the Act in non-diversity cases even though Congress didn't expressly say so in the Act. In deciding this question in the negative, the Court of Appeals recognized it was dealing with a novel question (Tr. 33). We think the question is not only novel, but is a sufficiently important federal question so that it should be decided by this Court. Rule 19, this Court. The scope of the Court of Appeals' opinion indicates to us that that Court also thought the record before it presented an important federal question. Particularly significant as regards the scope of the Court of Appeals' opinion, is its view that Congress did not intend, in enacting the Federal Motor Carrier Act, to permit any private suits for violation of the Act because Congress had specifically provided only for criminal penalties and injunctive remedies to be sought by the Commission (Tr. 35). Congessional intent is, of course, vital here. In our discussion of the *Restatement* and the *Brady* case (this petition pp. 7-10), we showed that Congress did intend to protect lawful from unlawful competition. No authority is cited by the Court of Appeals for its view that the Congressional intent was otherwise.

Bell v. *Hood* was the principal authority we cited to the Court of Appeals for the solution of the novel and important federal question just stated. In addition, though, we cited the Court of Appeals' own opinion in *Fratt* v. *Robinson,* 203 F. (2d) 627, and Judge Clark's opinion in *Baird* v. *Franklin,* 141 F. (2d) 238. These opinions we thought solved the problem by way of analogy. Here is the analogy.

Both the *Fratt* and *Baird* cases involved actions for money damages for violations of the Securities Exchange Act. The sections violated did not provide for money damages, though other

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sections of the Act did. Despite this fact, recovery was allowed in both cases. Indeed, the *Fratt* opinion relies on *Bell* v. *Hood*.

We think the analogy between the *Fratt* and *Baird* cases and this case is exact. Part I (the railroad carrier portion) is Chapter 1 of the present Interstate Commerce Act. Part II (the motor carrier portion) is Chapter 8. Secs. 8 and 9 of Chapter 1 specifically allow money damages for violations of Chapter 1 to anyone injured thereby. No private remedies are specifically provided for the violation of Chapter 8. However, Chapter 8 is a portion of the present Interstate Commerce Act because it was added to the original Act by way of *amendment* (Sec. 301, 49 U.S.C.). It was not separately enacted. It is, therefore, like the Securities Exchange Act, one piece of legislation, parts of which allow money damages for violations and parts of which do not so allow.

The Court of Appeals' refusal to apply its own opinion in the *Fratt* case was based on two grounds. One was that the Federal Motor Carrier Act is a ". . . wholly independent legislative enactment . . ." (Tr. 35). As we have just seen, the Federal Motor Carrier Act became a part of the Interstate Commerce Act by amendment of the latter. Moreover, the Court of Appeals itself, later in its Opinion, recognized the fact of amendment (Tr. 39, first full para.).

The Court of Appeals' other reason for not applying its *Fratt* opinion was that petitioner's cause of action apparently could be asserted in a state court while the cause of action involved in the *Fratt* case could not because of the Securities Exchange Act's specific denial of jurisdiction to state courts (Tr. 34). We think the answer to this is that whether petitioner has a state court cause of action was not before the Court of Appeals. Moreover, the statutory denial of state court jurisdiction contained in the

Securities Exchange Act does not create federal jurisdiction; it merely prohibits concurrent jurisdiction.

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

DONALD A. SCHAFER,
JAMES P. CRONAN, JR.,
803 Public Service Bldg.,
Portland 4, Oregon,
Counsel for Petitioner.

February 25, 1955.

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APPENDIX A

Part 1

Consolidated Freightways, Inc., v. United Truck Lines, Inc.

Civil No. 5913

ORAL OPINION

April 20, 1953.

This matter is now before the court on defendant's motion to dismiss for lack of jurisdiction over the subject matter.

Plaintiff is a common carrier, certificated by the Interstate Commerce Commission to transport property for compensation in interstate commerce by motor vehicle over U. S. Highway Number 30 between Boise, Idaho, and Pendleton, Oregon.

In its complaint filed against the defendant, also a common carrier by motor vehicle, it alleged that, although defendant was not certificated to carry property over Highway Number 30 between Boise, and Pendleton, it did carry on such operations in violation of the Interstate Commerce Act and that such unlawful operations resulted in a wrongful diversion of traffic from the plaintiff. Plaintiff therefore demanded damages for such loss of revenue.

Since there is no diversity of citizenship, both plaintiff and defendant being Washington corporations, plaintiff asserts that this court has jurisdiction by virtue of 28 USCA 1337, which reads as follows:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Plaintiff claims that it is entitled to damages under well established common law principles. Specifically, it contends that:

"The substantive law of this case is bottomed upon the proposition contained in Sec. 710 of the Restatement of Torts (American Law Institute, Vol. III, 1938):

" 'Sec. 710. Engaging in Business in Violation of Legislative Enactment.

" 'One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

" '(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and

" '(b) the enactment does not negative such liability.' "

The Motor Carrier Act, unlike the Railway Act, (49 USCA Secs. 8 and 9) does not give an aggrieved carrier the right to damages against one who is engaging in competition in violation of the Act.

However, plaintiff asserts:

"Even if the right here claimed be ultimately held to be a common law one, 49 USC, Sec. 317(b) specifically makes applicable the provisions of Sec. 22 of Title 49. Sec. 22 specifically retains common law remedies. Accordingly, if plaintiff's claim be a common law one, it is rooted in federal law."

Section 22 provides:

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

This provision has not been construed to establish or grant a right.

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Puerto Rico vs. Russell & Co., 288 U. S. 476, involved a tax by Puerto Rico on defendant's land. Defendant contended that, since the collection of the tax was permitted by an Act of Congress, a Federal question was presented. The court, in rejecting this contention stated (p. 483):

> "No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it."

Gully vs. First National Bank, 299 U. S. 109 (1936) involved a suit by a Mississippi tax collector for back taxes against a bank which had previously absorbed and assumed the liabilities of another bank. Taxes involved were for state and local taxes which had been imposed upon the shares of capital stock of the bank, its surplus and undivided profits. The suit was removed to the Federal District Court where the plaintiff's complaint was dismissed. It was affirmed by the Court of Appeals on the ground that the power to levy a tax upon shares of a national bank had its origin in Federal statutes and that plaintiff necessarily relied upon such statute in suing for the tax.

In reversing the judgment of the Court of Appeals and ordering the case remanded to the State Court, Justice Cardozo, speaking for the Supreme Court, stated, (p. 116):

> "The argument for the respondent proceeds on the assumption that because permission at times is preliminary to action the two are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. Let us suppose an amendment of the

> Constitution by which the states are left at liberty to levy taxes on the income derived from federal securities, or to lay imposts and duties at their pleasure upon imports and exports. If such an amendment were adopted, a suit to recover taxes or duties imposed by the state law would not be one arising under the Constitution of the United States, though in the absence of the amendment the duty or the tax would fail. We recur to the test announced in Puerto Rico vs. Russell & Co., supra: 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. Louisville & Nashville R. Co. vs. Mottley, supra. With no greater reason can it be said to arise thereunder because permitted thereby."

The fact that the Motor Carrier Act does not abridge or alter the carrier's common law rights does not give plaintiff a right under Federal Law.

I appreciate the fact that in its answer defendant denied it was operating over Highway Number 30 without Interstate Commerce Commission approval and that it did not admit such lack of authority even though a United States District Court had enjoined the defendant from operating over such highway between Boise, Idaho, and Pasco, Washington. It was not until after this judgment was affirmed by the Court of Appeals and certiorari was denied by the Supreme Court of the United States, that the defendant admitted such lack of authority. United States Truck Lines, Inc., vs. ICC (9 Cir.) 189 F. 2d 816 (May 31, 1951), cert. den. 342 U.S. 830 (October 8, 1951).

The original denial by the defendant does not alter my opinion that the cause of action stated in plaintiff's complaint

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does not arise under Federal law and that a substantial Federal question was not presented by such complaint.

Defendant's motion to dismiss is therefore granted.

Part 2

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONSOLIDATED FREIGHTWAYS, INC.,
a Corporation,
Appellant,

vs.

No. 13,890
Oct. 19, 1954

UNITED TRUCK LINES, INC.,
a Corporation,
Appellee.

Appeal from the United States District Court for the District of Oregon

Before: BONE, ORR and CHAMBERS, Circuit Judges

BONE, Circuit Judge.

Both parties to this action are Washington corporations and common carriers of property operating motor trucks which cross state lines. Their operations come under the jurisdiction of the Interstate Commerce Commission by virtue of the provisions of Part Two of the Interstate Commerce Act, as amended, covering operations of such motor carriers, herein, the Motor Carrier Act (Title 49 U.S.C.A. sections 301 to 327, inclusive) being Chapter Eight of the present Interstate Commerce Act.

Appellant instituted this action in the lower court seeking only money damages from appellee. Its complaint purported to invoke the jurisdiction of the court "Under the general laws relative to actions at law arising under the Constitution and laws of the United States, and particularly under the Interstate Commerce

Act, as amended;" and pursuant to the provisions of Section 1337 of Title 28, U.S.C.A.

The facts upon which appellant predicates its claim for relief are that it held a certificate from the Interstate Commerce Commission to transport property over U. S. Highway No. 30; that appellee did not hold such a certificate over U. S. Highway No. 30; that appellee, notwithstanding, had been transporting property over that highway and had thereby diverted traffic and revenues from appellant. The complaint demanded money damages therefor.

Appellee, by a Motion to Dismiss, challenged the jurisdiction of the lower court on the ground that the complaint, upon its face, shows that there is no diversity of citizenship between the parties, and that there is no federal question involved in this litigation. The lower court granted appellee's motion and dismissed the action "for want of federal jurisdiction."

Appellant seeks reversal of the lower court's order of dismissal on either of two theories, posed as follows:

(1) A complaint alleging a violation of the Motor Carrier Act to appellant's monetary damage presents a federal question even though the Act does not specifically provide for such damages, and

(2) The Motor Carrier Act by reserving common law remedies created a federal right cognizable in a district court as a federal question.

These contentions are considered in the order stated.

APPELLANT'S FIRST POINT

As to the first proposition appellant frankly admits that it "can find no case holding that a complaint alleging a violation of the Motor Carrier Act and seeking damages, presents a federal question." It also expresses the belief that "the exact question has never before been raised."

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In the complete absence of authority appellant relies upon our opinion in Fratt v. Robinson, 203 F. 2d 627, a case involving a suit for money damages resulting from a violation of Section 10(b) of the Securities Exchange Act (15 U.S.C.A. 78j(b). It asserts that the Fratt case is "indistinguishable in principle" from the case at bar, and declares it to be "exactly comparable."

We cannot agree with appellant's view of the effect of the Fratt decision on the issue posed in this case, for we think that the problem in Fratt was quite different from the problem here considered. One of the distinguishable features is that the Fratt case arose under the Securities Exchange Act which contains this provision (15 U.S.C.A. 78 aa)

> "The district courts * * * shall have *exclusive jurisdiction* of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." (Italics ours.)

No claims are here made that appellant's purported cause of action or claim for relief could not be asserted and properly adjudicated in a state court.

Appellant concedes that "except for its reservation of common law remedies, the Federal Motor Carrier Act is silent as to any private remedy for a violation of any of its provisions. All it does is provide for criminal penalties and injunctive remedies to be sought by the Commission." But appellant argues that "the *expressio unius* rule is no barrier" to assertion of its claim; and referring to our Fratt opinion, it argues that we there held, upon the authority of Bell v. Hood, 327 U.S. 678, that a complaint seeking money damages for violation of a federal statute raised a federal question even though the portion of the statute which was alleged to have been violated did not provide for damages for that violation. Pursuing this line of argument, appellant urges us to compare the Securities Exchange Act of 1934 with

the Motor Carrier Act, for it contends that in the Fratt case we approved a claim for damages under Section 10(b) of the Securities Exchange Act, although that section provided no right to damages, while other sections of the Act did provide for damages.

In oral argument appellant urged that Part I of the Interstate Commerce Act (the original Act) and Part II of the Interstate Commerce Act (The Motor Carrier Act of 1935) must be regarded as one piece of legislation on the theory that Part II is merely an amendment of Part I and as such necessarily "incorporates", i.e., assimilates, the provisions of Sections 8 and 9 of Part I (49 U.S.C.A., Sections 8 and 9).[1]

We do not agree with the theory advanced in the preceding paragraph. As we have indicated above, Part II makes provision only for criminal penalties and injunctive remedies to be sought by the Commission. In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself.

Relying on language in the Fratt case, appellant urges that we should not apply the *expressio unius* rule in the case at bar. We think that the rule should be applied. Appellant then points out (by way of analogy) that in similar fashion, the Motor Carrier Act provides for criminal penalties and injunctive remedies, but does not provide a right to damages.

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[1]These two sections of the original Act make any common carrier under that Act liable in damages to the person or persons injured by its violation. They permit an action for recovery of such damages to be brought in any district court of the United States unless the injured party elects to rely for relief on a complaint he may make directly to the Commission. If he resorts to such complaint to the Commission, he is denied the right to maintain a private suit for damages in the federal courts.

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Furthermore, we do not agree with appellant's argument that "the *expressio unius* rule is no barrier here." On the contrary, we think that there was an excellent reason why Judge Clark did not apply this rule in his dissent in the Baird case (141 F. 2d 238) to which we referred in our Fratt opinion. That reason is not present in this case. In our Fratt opinion we said (p. 632):

> "Judge Clark disposes of the applicability of the *expressio unius est exclusio alterius* rule, (and we are in agreement with him,) by pointing out that the sections which contain specific rights of action are '* * * sections [which] deal with special matters only indirectly germane to the regulation of securities exchanges; they provide for more unrestricted recovery than would be possible at common law; and they prescribe narrow statutes of limitation.' "

Appellant also relies on Bell v. Hood, supra. Bell based his right to bring his action in a federal court on a charge resting on a theory that the defendants had tortiously deprived him of *rights* guaranteed by the Fourth and Fifth Amendments.

The basic distinction between the posture of the Bell case and that of the case at bar can be seen in a quote in appellant's brief as follows: "This Court in the Fratt opinion quoted from the Supreme Court's opinion in the Bell case on the Federal question point as follows:

> "* * * where federally protected *rights* have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (Italics ours.)

Obviously, the Bell case was concerned with *rights guaranteed* by the Fourth and Fifth Amendments (although basicly these rights were to be protected against invasion by government). In 1893, the Supreme Court said in Monongahela Navigation Co. v. United States, 148 U. S. 312 at 324:

> "The first 10 amendments to the Constitution, adopted as they were soon after the adoption of the Constitution,

> are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights."

It is equally obvious that in the case at bar appellant had no such *protected rights.* It had sought and received from the federal regulatory body a certificate of public convenience and necessity under which authority it was *permitted* to transport property over U. S. Highway No. 30. Without such a certificate appellant could not lawfully operate over this interstate highway as a motor carrier; the Motor Carrier Act and regulations issued pursuant thereto authorize the Interstate Commerce Commission to secure injunctions from federal courts to stop interstate motor truck operations by an operator who does not possess such a certificate (Cf. United Truck Lines, Inc. v. Interstate Commerce Commission, 189 F.2d 16, cert. denied 342 U. S. 830).

In the Bell case (p. 683) the court said:

> "* * * the alleged violations of the Constitution here are not immaterial but form rather *the sole basis of the relief sought.*" (Italics ours.)

Although appellant in the case at bar charged appellee with a breach of the Interstate Commerce Act by transporting property for compensation in interstate commerce without obtaining from the Commission a "certificate" over the route in question, still it does not clearly appear that the complaint was "drawn so as to claim a right to recover under the Constitution and laws of the United States," or that appellee's alleged violation of the Motor Carrier Act forms the "sole basis of the relief sought." In fact appellant's contentions clearly and bluntly establish that the real basis of its suit is "unfair competition," and that appellee's violation of the Interstate Commerce Act had the legal effect

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of creating a common law right of action in favor of appellant under a theory of liability discussed in Section 710 of the Restatement of Torts dealing with "Engaging in Business in Violation of Legislative Enactment."

In a Memorandum of Authorities provided for the district court, appellant emphasized that the basis for the recovery sought by it was *a violation of the common law.* There it said:

> "The substantive law of this case is bottomed upon the proposition contained in Sec. 710 of the Restatement of Torts (American Law Institute, Vol. 111, 1938):
>
> " 'Sec. 710. Engaging in Business in Violation of Legislative Enactment.
>
> " 'One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,
>
> " '(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and
>
> " '(b) the enactment does not negative such liability.'
>
> "A careful study of the Interstate Commerce Act, as amended, including the Motor Carrier Act of 1935, and of the legislative history and administrative and court interpretations of the Act, leaves no doubt that the Act is of the character described in the Restatement proposition."

This memorandum then traced the common law development of this theory from a case in 1706, this to establish its right to recover on the basis of "unfair competition." Absolutely no claim is made of a right to recover based on the statute itself.

It is obvious from the whole setting of the Motor Carrier Act that Congress pre-empted this field of control over the motor carrier type of Interstate Commerce. It is abundantly clear that

Congress intended regulatory controls to be exercised by the Commission and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and the regulations thereunder.

APPELLANT'S SECOND POINT

As we have indicated, appellant sought to recover in the lower court on a common law cause of action based on the principle announced in Section 710 of the Restatement of Torts. And in this case there was no diversity of citizenship between the parties.

Appellant invokes and specifically relies on certain language appearing in Chapter One of the original Interstate Commerce Act,[2] Part One (49 U.S.C.A., Section 22, which chapter deals only with carriers *other than* motor carriers). This language reads as follows:

> "* * * and nothing in this chapter [Chapter One] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *"

The language thus used in Section 22 was obviously intended to apply *only to carriers other than motor carriers.*

A later amendment (1935) to the original Interstate Commerce Act became the Motor Carrier Act with which we are here principally concerned.

Appellant further relies on a certain provision in the Motor Carrier Act (Section 317(b)) which carried over into this later Act the various provisions of Section 22 of the older Interstate Commerce Act. This provision (317(b)) reads as follows:

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[2]See Chapter One, Interstate Commerce Act Part One, 49 U.S.C.A., Sections 1 to 27, inclusive.

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"Provided, That the provisions of Sections * * * 22 of this title [49] shall apply to common carriers by motor vehicles subject to this Chapter."

Appellant's case thus necessarily rests upon the assumption that the two statutory provisions just above quoted establish its right to maintain in a federal court a cause of action based on common law remedies *for unfair competition,* this because such remedies arise "under an Act of Congress," hence jurisdiction exists under Section 1337, Title 28, U.S.C.A.

A brief reference to Section 22, supra, is in order. That section specifies in great detail various kinds of *restrictions* which may not be imposed on various operational activities of the interstate carriers referred to, and covered by, the terms of Chapter One of Part One of the original Interstate Commerce Act. The language used in said Section 22 simply and specifically removed any barriers to these particular carriers exercising certain enumerated *privileges* in respect to their business operations, and a reference thereto renders it unnecessary to here restate these particular *privileges.*[3]

The specific language appearing in the body of the text of Section 22, supra, refers to preservation of *remedies* "now existing at common law or by statute," but appellant does not attempt to rely upon, nor does it cite, any judicial authority indicating resort to, or the application of, orthodox common law remedies against the carriers covered by Chapter One of the Interstate Commerce Act in any instance where *unfair competition* between carriers in the securing of business was the basis of a demand for relief. As we have indicated above, appellant makes no such showing, and we are persuaded that none can be made.

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[3]We think that so far as concerns the issues of this case, the effect of the cited language in Section 317(b) of the Motor Carrier Act was to confer on motor carriers the same character of immunities and privileges then enjoyed by rail carriers by virtue of the provisions of Section 22 of the original Interstate Commerce Act.

Appellant has furnished us with memos in its brief indicating the filing of complaints by various parties against the Pennsylvania Railroad Company (in 1908) in the Court of Common Pleas of Clearfield County, Pennsylvania. Failure or refusal to furnish coal cars, and discrimination and preferences *in this regard* appears to be the gravamen of the charge in the complaints in these state cases. Unfair competition between rail carriers was not involved.

The outcome of the litigation in these state cases is not shown, and in any event Chapter One of the Interstate Commerce Act specifically prohibited the above noted practices by a railroad common carrier, and in addition, Sections 8 and 9 of Chapter One specifically authorize private suits for damages against a carrier by a person or persons injured by a carrier's violation of the Act. Even though a common law remedy invoked in a state court might have ultimately been judicially held to be available to shippers denied sufficient coal cars, by an interstate rail carrier, it must be pointed out that the *right* to cars directly arose under federal law.

In the case at bar, appellant concedes that no statutory right to a common law remedy for damages for alleged "unfair competition" of a motor carrier is preserved, as is (and was) the *statutory right* of shippers in 1908 to have coal cars provided by a railroad common carrier.

As Judge Soloman said in his oral opinion in the district court, "The fact that the Motor Carrier Act does not abridge or alter the carrier's common law rights does not give plaintiff a right under Federal Law." We agree.

Judgment is affirmed.

(Endorsed:) Opinion. Filed Oct. 19, 1954.

Paul P. O'Brien, Clerk.

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APPENDIX B

Interstate Commerce Act, Part I, Section 8, 24 Stat. 382, 49 U.S.C. Sec. 8:

"Sec. 8. Liability in damages to persons injured by violation of law. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, Part I, Section 9, 24 Stat. 382, 49 U.S.C. Sec. 9:

"Sec. 9. Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence

may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Interstate Commerce Act, Part I, Section 22, 24 Stat. 387, 49 U.S.C. Sec. 22:

"Sec. 22. Restrictions.

Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 of this title reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this chapter shall be construed to prevent railroads from giving free carriage

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to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; nothing in this chapter shall be construed to prohibit any common carrier from carrying any totally blind persons accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier; *Provided,* That no pending litigation shall in any way be affected by this chapter: *Provided further,* That nothing in this chapter shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this chapter, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this title; and all the provisions of said section relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchange mileage tickets as with regard to other joint rates, fares, and charges referred to in said section. It shall be unlaw-

ful for any common carrier that has issued or autohrized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section 10 of this title shall apply to any violation of the requirements of this proviso. Nothing in this chapter shall prevent any carrier or carriers subject to this chapter from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided,* That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this chapter shall be deemed to have violated the provisions of such chapter with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates."

Interstate Commerce Act, Part II, Section 301, 49 Stat. 543, 49 U.S.C. Sec. 301:

"Sec. 301. Short title.

This chapter may be cited as Part II of the Interstate Commerce Act."

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Interstate Commerce Act, Part II, Section 306(a)(1), 49 Stat. 551, 49 U.S.C. Sec. 306(a)(1):

"Sec. 306. Certificate of convenience and necessity—(a) Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possessions; 'grandfather' provisions

(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application

the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Interstate Commerce Act, Part II, Section 307(a), 49 Stat. 551, 49 U.S.C. Sec. 307(a):

"Sec. 307. Issuance of certificate—(a) Issuance authorized to qualified applicants for regular routes and between fixed termini

Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Interstate Commerce Act, Part II, Section 307(b), 49 Stat. 551, 49 U.S.C. Sec. 307(b):

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"(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

Interstate Commerce Act, Part II, Section 317(b), 49 Stat. 560, 49 U.S.C. Sec. 317(b):

"(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or permit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privilege or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided,* That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter."

Section 1, Hepburn Act of 1906, 34 Stat. 584 (so far as here material):

"Sec. 1. * * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, * * *" (34 Stat. 584 near bottom of page).

Section 1, Hepburn Act of 1906, 34 Stat. 584, as now incorporated in 49 U.S.C. Sec. 1(4):

"(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to

make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

28 U.S.C., Section 1331, 62 Stat. 930:

"Sec. 1331. Federal question; amount in controversy

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C., Section 1337, 62 Stat. 931:

"Sec. 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

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APPENDIX C

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD

No. 221 May Term, 1908

PLAINTIFF'S STATEMENT

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, viz:—

FIRST:—That the Puritan Coal Mining Company is a corporation organized and existing under the laws of Pennsylvania, and from the day of A.D. 1902, to the day of A.D. 1906, was the owner of a leasehold upon large body of bituminous coal, situate in the County of Cambria, State of Pennsylvania, and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom, to points and places within the territorial limits of Pennsylvania.

SECOND:—That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania, by an Act of Assembly approved the 13th day of March, 1946, and is by virtue of the laws and constitution of the said State, a common carrier engaged in the transportation of passengers and property, under a common control, management or arrangement for a continuous carriage of shipment from points and places within the State of Pennsylvania, to other points and places within the said State, and was and is engaged in carrying, hauling and

transporting bituminous coal from points and places along its main line and branches within said State, to other points and places within said State.

THIRD:—That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company are situate along or near the line or branch line of the defendant company in the County of Cambria, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff during the period from the 1st day of April A.D. 1902, to the 1st day of Jany, A.D. 1905, was shipped over said main line and branch of the defendant company by continuous carriage or shipment, and under the control and management of the defendant company, to points and places within the State of Pennsylvania.

FOURTH:—That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine, and publish the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at the mines for use in the carriage and transportation of its product, and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines.

FIFTH:—That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant has for daily

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distribution; but the defendant company disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with its pro rata share of the coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice, in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars, distribute and give to said company five hundred (500) cars before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received, except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company.

SIXTH:—That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, one thousand (1000) steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate mordets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale deprive the plaintiff from receiving its pro-rata percentage of said one thousand cars for use in hulling and transporting the product of its mines, to points and places within the State of Pennsylvania.

SEVENTH:—That during all of said period of time, to wit, from the 1st day of April, A. D., 1902, to the 1st day of January, A. D., 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had during all of said time constant demand and orders for its coal,

in excess of the supply of coal cars furnished by the defendant company for transportation of the same to its customers, and could and would have moned and shipped a large amount of coal in excess of what it did mine and ship, to wit, 64587 tons, which it would have sold to its customers therein at a price aggregating F. O. B. cars above costs of producing same the sum of $49906.07 Dollars; but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the a foresaid Berwind-White Coal Mining Company. That because of said undue and unreasonable discriminatory acts, the plaintiff suffered damage and loss in its business of mining and selling its product in the markest of the soft coal trade and in points and places and to consumers of soft coal within the lines of the State of Pennsylvania and it, therefore, brings this action to recover compensation forsaid loss and damage in the sum of $49936.07 Dollars with such additional amount as will compensate plaintiff for the delay on part of the defendant Company.

KREBS LIVERWRIGHT.
Attorney

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

PURITAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY

No. 221 May T. 1908

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, do hereby certify that the within is a true and correct copy of the original Statement of the Plaintiff, filed in this office,

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IN WITNESS THEREOF, I HEREUNTO SET my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
WM. T. HAGERTY,
Prothonotary.

SEAL

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

PURITAN COAL MINING COMPANY

against

PENNSYLVANIA RAILROAD COMPANY

No. 221 May Term, 1908

PLAINTIFF'S AMENDED STATEMENT

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, to wit:—

FIRST:—That the Puritan Coal Mining Company is a corporation organized and existing under the Laws of Pennsylvania, and from the_____day of_____A. D., 1902, to the _____day of_____A. D. 1908, was the owner of a leasehold upon the large body of bituminous coal situate in the County of Cambria, State of Pennsylvania; and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom to various points and places;

SECOND:—That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania by an Act of Assembly approved the 13th day of March, 1846, and is by virtue of the laws and constitution of the said State a common carrier engaged in the transportation of passengers and property, and was and is engaged in carrying, hauling and transporting bitumi-

nous coal; and undertook and agreed, in consideration of the franchises to it granted by the Commonwealth of Pennsylvania, to give and grant unto the plaintiff the facilities necessary for the transportation of its coal to market without discrimination in favor of other companies, corporations or individuals; and to furnish it with care and motive power without any preference to other companies, corporations or individuals; but the defendant has failed and refused to perform its duty thus imposed upon it in the manner and to the extent hereinafter narrated;

THIRD — That under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches, for the accomodation and use of the persons, firms and corporations engefed in mining and producing bituminois coal in the regions tributary to defendant's main line and branches; and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from bituminous coal regions tributary, as aforesaid, to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland, and Indiana and elsewhere; and to let and hire the same unto the plaintiff in this action. That the defendant company did not, as required by law, provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations, mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market, during the orginary conditions and demands of the market for bituminous coal,

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the amount of coal it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and caused to be transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, by reason of which failure in the performance of its duty and legal obligations, the defendant caused the plaintiff to suffer great damage, to wit:—damage in the sum of Two Hundred Sixty Thousand Seven Hundred seventy-seven and 96/100 Dollars.

FOURTH—That the mines of the plaintiff and the mines of other shippers, of bituminous coal, especially of the Berwind-White Coal Mining Company, are situate along or near the line, or branch line, of the defendant company in the County of Cambria and adjoining counties, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff, during the period from the 1st day of April, 1902, to the 1st day of January, 1905, was shipper over said main line and branches of the defendant company;

FIFTH—That the defendant company, during all of the period aforesaid, arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine and publish the capacity of its mines, and did estimate, fix and determine the per centage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product; and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and it so fixed and determined the percentage of coal cars the said several operators and owners

of mines were entitled to have and receive for the carriage and transportation of the products of their mines:

SIXTH—That the duty and obligation of the defendant company as a common carrier and a public highway, was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the per centage of the number of coal cars to which plaintiff was entitle out of the whole number that defendant had for daily distribution; but the defendant company, disregardeding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with the pro rate share of coal cars which it had for daily distribution, and did subjecy the plaintiff to undue and unreasonable disadvantage and prejudice in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars distribute and give to said company five hundred cars (500) before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day which the per centage affixed by the defendant company entitled the plaintiff to receive, and which it would have received except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company.

SEVENTH—That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of the said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, to the said Berwind-White Coal Mining Company, one thousand (1000) steel cars of large capacity, which it, the defendant, had purchased for use in the transportation of bituminous coal, and by said transfer and sale deprive the plaintiff

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from receiving its pro rate per centage of said one thousand cars for use in hauling and transporting the product of its mines:

EIGHTH—That during all of said period of time, from the 1st day of April, 1902, to the 1st day of January, 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; and it had, during all of said time, constant demand and orders for its coal in excess of what could be moved in the supply of coal cars furnished by the defendant company for transportation of the same to plaintiff's customers, and it could and would have mined and shipped a large amount of coal in excess of what id did mine and ship, all of which it could and would have sold at a price aggregating f.o.b cars, above the cost of producing same, the sum of Two Hundred Sixty Thousand Seven Hundred seventy-seven and 96/100 Dollars ($260,777.96); but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That said sum of $260,777.96 aggregates the reasonable profit that plaintiff could and would have made upon the coal it reasonably could and would have shipped from its mines in the following amounts, but for defendant's discriminatory acts:—

In 1902	68,501 tons
in 1903,	146,234 Tons
In 1904	83,747 Tons

and because of said undue and unreasonable discriminatory acts of defendants, hereinbefore narrated, the plaintiff suffered damage and loss in its business of mining and selling its product, as hereinbefore set forth, and it therefore brings this action to recover from the defendant compensation for said loss and damage in the sum of $260,777.96, with such additional amount as will compensate plaintiff for the delay on the part of the defendant company.

KREBS & LIVERWRIGHT
Attorneys for Plaintiff.

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

PURITAN COAL MINING COMPANY

VS.,

PENNSYLVANIA RAILROAD COMPANY

No. 221 May T. 1908

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, do hereby certify that the within is a true and correct copy of the Original Plaintiff's Amended Statement, filed in this office, and we further certify that issue was formed on the Defendant's Petition to dismiss for Want of Jurisdiction and that No Answer to the Amended Statement has been or was filed.

IN WITNESS THEREOF, I, HEREUNTO SET my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
WM. T. HAGERTY,
Prothonotary.

SEAL

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS

PENNSYLVANIA RAILROAD CO.

No. 322 May Term, 1909

PLAINTIFF'S STATEMENT

The Sonman Shaft Coal Company, the plaintiff in this action, against the Pennsylvania Railroad Company, the defendant, summoned to answer the plaintiff in a plea of trespass, files this statement of claim and seeks to recover damages which it has

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suffered because of the illegal and wrongful acts of the defendant, and sets forth the following statement of facts as the foundation of its right to recover, to wit:—

FIRST:—That the plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania for the purpose of mining, shipping and selling coal from its mines in Cambria County, Pennsylvania, in the open bituminous coal markets, and that it controlled by leasehold and otherwise a large amount of high grade valuable bituminous coal in the year beginning the 1st of April, 1903, and since that time to the date of the bringing of this suit.

SECOND:—That the Pennsylvania Railroad Company, the defendant, is th owner of and controls a main line and branch line of railroad extending from points nd places in Cambria County, Pennsylvania, and as far west as Pittsburgh, Pa., and as far east as the Eastern territorial limits of the State of Pennsylvania, and is by its charter a common carrier" and a public highway", and made such also by the Constitution and Statute Laws of the State of Pennsylvania.

THIRD:—The plaintiff further avers in this behalf that under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bitiminous coal over its main line and branches for the accomodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal

in the regions tributary as aforesaid its main line and branches in the Counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere, and to let and hire the same to the plaintiff in this action. That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrosn, persons, firms and corporations mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as qould enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal, it could a d would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market to points and places within the State of Pennsylvania, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and have transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, and by reason of which failure in the performance ot its duty and legal obligation, the defendant caused the plaintiff to suffer damage, to wit, damage to the sum of Two Hundred Thousand ($200,000) Dollars.

FOURTH:—That under and by virtue of the charter of the defendant company, as well as by the Constitution and Laws of this Commonwealth, the defendant company was in law bound and required to furnish equal and permit like facilities to all persons, firms and corporations mining, producing and shipping bituminous coal over its main line and branches; and especially as the defendant company bound in law not to make any undue or unreasonable discrimination between persons, firms and corporations engaged in mining, producing and shipping bituminous coal from the Counties of Blair, Cambris, Clearfield, Westmore-

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land, and Indiana; yet disregarding its duty and legal obligations it did, between the 1st of April, 1903, and the 1st of April, 1908, unduly and unreasonably give and grant unto other persons, firms and corporations mining and producing bituminous coal, and having the same transported over its main line and branches from the counties aforesaid, the privileges, advantages and facilities which it denied to the plaintiff, and did unduly and unreasonably discriminate against the plaintiff in the distribution of the coal cars upon its main line and branches in use for the transportation of bituminous coal, and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producig and shipping bituminous coal, and did by special orders during said period of time covered by this action, give and grant unto the said Berwin-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping coal, special advantages in the distribution of coal cars, and did unduly and unreasonably discriminate in favor of said Coal Companies named, and other persons, firms and corporations not especially named, and against the plaintiff. And the plaintiff further in this behalf avers that the defendant company did unduly and unreasonably discriminate against it and in favor of the Berwind-White Coal Mining Company, the Keystone Coal and Cake Company, the Columbia Coal Mining Company as well as other persons, firms and corporations, by causing to be transferred to said corporations a large number of coal cars from its ownership, custody and control into the custody and control of said favored shippers, thereby decreasing and diminishing its capacity to transport and carry the bituminous coal for the plaintiff over its main line and branches, and by the transfer of said coal cars from the defendant's ownership and control, did lessen

the number of cars which it would otherwise have had for daily distribution to the plaintiff, and did decrease and diminish its pro rata share of coal cars, and its facilities for having its coal transported to markets, and to points and places within the State of Pennsylvania, and that by said acts of discrimination as aforesaid, did during all of the period of time between the 1st of April, 1903, and the 1st of April 1908, cause great damage to be done to and suffered by the plaintiff, to wit, damages in the sum of Two Hundred Thousand ($200,000) Dollars.

FIFTH:—The plaintiff further in this behalf avers that because of the said several acts of discrimination aforesaid, as well as by reason of the failure of the defendant company to to furnish it with an adequate and sufficient supply of coal cars during the ordinary conditions and demands of the coal trade to have the product of its mines carried and transported to the market (at points and places within the State of Pennsylvania) it was compelled to purchase and did purchase eighty (80) coal cars for the sum or price of Ninety Thousand ($90,000) Dollars, and that subsecuently by reason of the conduct of the defendant company, it was compelled to sell said coal cars and did sell them for the sum of Sixty Thousand ($60,000) Dollars, thereby suffering loss to the extent of Thirty Thousand ($30,000) Dollars, which amount plaintiff claims to recover also in this action, in addition to the amount of damages set forth above arising from the undue and unreasonable discrimination of the defendant company in the distribution of coal cars.

SIXTH:—Plaintiff further avers that because of the inadequate and insufficient supply of coal cars by the defendant company for the transportation of the product of plaintiff's mines, and by reason of the undue and unreasonable discrimination on the part of the defendant in favor of other persons, firms and corporations, as hereinbefore recited, that the plaintiff company in order to keep its mine running, and to keep its organization and force of men together, and to prevent loss from the fixed

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charges at said mines when the same were standing idle for want of cars to transport its coal, it was compelled to and did sell the Berwind-White Coal Mining Company, a large amount of coal at a price per ton of ten (10) cents below the ordinary contract price, and did thereby suffer a loss of Ten Thousand ($10,000) Dollars, which sum plaintiff also seeks to recover in addition to the damages sought to be recovered because of the undue and unreasonable discrimination against the plaintiff in the distribution of cars as hereinbefore stated.

KREBS & LIVERIGHT
Attys: for Plffs.

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS.,

PENNSYLVANIA RAILROAD COMPANY

No. 322 May Term, 1909

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, Pennsylvania, do hereby certify that the within is a true and correct copy of the original Plaintiff's Statement filed in the above captioned case.

IN WITNESS THEREOF, I HEREUNTO set my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
WM. T. HAGERTY,
Prothonotary.

SEAL

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS

PENNSYLVANIA RAILROAD COMPANY

No. 322 May Term, 1909

PLAINTIFF'S AMENDED STATEMENT

The Sonman Shaft Coal Company, the plaintiff, in this action, against the Pennsylvania Railroad Company, the defendant, summoned to answer the plaintiff in a plea of trespass, files this statement of claim and seeks to recover damages which it has suffered because of the illegal and wrongful acts of the defendant, and sets forth the following statement of facts as the foundation of its right to recover, to wit:—

FIRST:—That the plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania for the purpose of mining, shipping and selling coal from its mines in Cambria County, Pennsylvania, in the open bituminous coal markets, and that it controlled by leasehold and otherwise a large amount of high grade valuable bituminous coal in the year beginning the 1st of April, 1903, and since that time to the date of the bringing of this suit.

SECOND:—That the Pennsylvania Railroad Company, the defendant, is the owner of and controls a main line and branch line of railroad extending from points and places in Cambria County, Pennsylvania, and as far West as Pittsburgh, Pa., and as far East as the Eastern territorial limits of the State of Pennsylvania, and is by its charter a "common carrier" and a "public highway", and made such also by the Constitution and Statute Laws of the State of Pennsylvania.

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THIRD:—The Plaintiff further avers in this behalf that under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bitiminous coal trade, an adequate, and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches for the accomodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bitiuminous coal from the bituminous coal regions tributary as aforesaid to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere, and to let and hire the same to the plaintiff in this action. That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms, and corporations mining and producing bituminous coal in the fegions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal, it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and have transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, and by reason of which failure in the performance

of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit. damage to the sum of Two Hundred Thousand Dollars, ($200,000.00).

FOURTH:—that under and by virtue of the charter of the defendant company, as well as by the Constitution and Laws of this Commonwealth, the defendant company was in law bound and required to furnish equal and permit like facilities to all persons, firms and corporations mining, producing and shipping bituminous coal over its main line and branches, and especially was the defendant company bound in law not to make any undue or unreasonable discrimination between persons, firms and corporations engaged in mining, producing and shipping bituminous coal from the counties of Blair, Cambria, Clearfield, Westmoreland and Indiana; yet disregarding its duty and legal obligations it did, between the 1st of April, 1903, and the 1st of April 1908, unduly and unreasonable give and grant unto other persons, firms and corporations mining and producing bituminous coal, and having the same transported over its main line and branches from the Counties aforesaid, the privileges, advantages and facilities which it denied to the plaintiff, and did unduly and unreasonably discriminate against the plaintiff in the distribution of the coal cars upon its main line and branches in use for the transportation of bituminous coal, and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping bituminous coal, and did by special orders during said period of time covered by this action, give and grant unto the said Berwind-White Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping coal, special advantages in the distribution of coal cars, and did unduly and unreasonably discriminate in favor of said Coal Companies named, and other persons, firms and corporations not especially

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named, and against the plaintiff. The plaintiff further in this behalf avers that the defendant company did unduly and unreasonably discriminate against it and in favor of the Berwin-white Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, as well as other persons, firms and corporations, by causing to be transferred to said corporations a large number or coal cars from its ownership, custody and control into the custody and control of said favored shippers, thereby decreasing and diminishing its capacity to transport and carry the bituminous coal for the plaintiff over its main line and branches, any by the transfer of said coal cars from the defendant's ownership and control, did lessen the number of cars which it would otherwise have had for daily distribution to the plaintiff, and did decrease and diminish its pro rata share of coal cars, and its facilities for having its coal transported to marketm and that by said acts of discrimination as aforesaid, did during all of the period of time between the 1st of April, 1903, and the 1st of April, 1908, cause great damage to be done to and suffered by the plaintiff, to wit, damages in the sum of Two Hundred Thousand (200.000) Dollars.

FIFTH:—The plaintiff further in this behalf avers that because of the said several acts of discrimination aforesaid, as well as by reason of the failure of the defendant company to furnish it with an adequate and sufficient supply of coal cars during the ordinary conditions and demands of the coal trade, to have the product of its mines carried and transported to the market, it was compelled to purchase and did purchase eighty (80) coal cars for the sum or price of Ninety Thousand (90,000) Dollars, and that subsequently by reason of the conduct of the defendant company, it was compelled to sell said coal cars and did sell them for the sum of Sixty Thousand (60,000) Dollars, thereby suffering loss to the extent of Thirty Thousand (30,000) Dollars, which amount plaintiff claims to recover also in this action, in addition to the amount of damages set forth above arising from

the undue and unreasonable discrimonation of the defendant company in the distribution of coal cars.

SIXTH:—Plaintiff further avers that because of the inadequate and in sufficient supply of coal cars by the defendant company for the transportation of the product of plaintiff's mines, and by reason of the undue and unreasonable discrimination on the part of the defendant in favor of other person, firms and corporations, as hereinbefore recited, that the plaintiff company in order to keep its mines running, and to keep its organization and force of men together, and to prevent loss from the fixed charges at said mines when the same were standing idle for want of cars to transport its coal, it was compelled to and did sell the Berwind-White Coal Mining Company, a large amount of coal at a price per ton of ten (10) cents below the ordinary contract price, and did thereby suffer a loss of Ten Thousand (10,000) Dollars, which sum plaintiff also seeks to recover in addition to the damages sought to be recovered because of the undue and unreasonable discrimination against the plaintiff in the distribution of cars as herein before stated.

KREBS & LIVERIGHT
Attorneys for Plaintiffs.

Now, September 27, 1911, the defendant objects to the proposed amendment to the third, fourth and fifth paragraphs of Plaintiff's Statement as not being authorized by the statutes of amendment and as introducing another and different cause of action and as introducing cause of action not within the jurisdiction of this Court.

MURRAY & O'LAUGHLIN
Attorneys for Defendant.

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IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS.,

PENNSYLVANIA RAILROAD COMPANY

No. 322 May Term, 1909

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, do hereby certify that the within is a true and correct copy of the original Plaintiff's Amended Statement, filed in the above captioned case, and further, I do hereby certify that Issue was formed on the Defendant's Petition to Dismiss for Want of Jurisdiction and that, No Answer was filed to the Plaintiff's Amended Statement.

IN WITNESS THEREOF, I hereunto set my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
Wm. T. Hagerty
Prothonotary.

SEAL

COPY

FILED
APR 1 1955
HAROLD B. WILLEY, C

In

The Supreme Court

of the United States

OCTOBER TERM, 1954

No. 631

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Petitioner,

vs.

UNITED TRUCK LINES, INC.,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

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In
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OCTOBER TERM, 1954

No. 631

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Petitioner,

vs.

UNITED TRUCK LINES, INC.,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

The petition heretofore filed seeks the granting of a Writ of Certiorari principally upon the ground that the violation of the Federal Motor Carrier Act here involved is enough to confer federal jurisdiction of a private action for damages, in the absence of diversity (see "Question Presented", Pet. p. 2). Alternatively, we suggested that, if the lower Courts were right in holding that the complaint was really seeking to enforce common law remedies, a federal question was presented because this Court had so held nearly forty years ago (Pet. 10-15). In its

brief, respondent gives its summary of the complaint (Br. 2-4) and concludes, based on the summary, that petitioner was not relying on any Act of Congress (Br. p. 6). As to the common law point, respondent urges that this Court's opinions on which we rely decided merely that actions for violations of the Interstate Commerce Act might be prosecuted in state courts. We desire briefly to reply to these two points.

We agree that it is quite possible to conclude that petitioner's complaint did not rely on any Act of Congress *if* respondent's summary (Br. 2-4) of the complaint is accurate. Respondent, however, did not accurately summarize the complaint.

As pointed out in the first paragraph of our Statement of the Case (Pet. p. 3) the complaint alleges that: (1) petitioner transported property for compensation interstate over a designated highway by express permission of the Interstate Commerce Commission obtained as required by law; (2) respondent transported property for compensation interstate over the same highway without such permission; and (3) such unlawful operations of respondent were directly competitive with petitioner's operations and resulted in a diversion of traffic so that petitioner was entitled to money damages for "such illegal operations".

In addition to the pleaded violation of the Federal Motor Carrier Act, petitioner pleaded in *haac verba* 28 U.S.C. Sec. 1337 which gives the district courts original jurisdiction of civil actions arising under Acts of Congress regulating commerce. In other words, petitioner contended, based on the complaint, that the action "arose" because the Act was violated.

In its summary of the complaint respondent quotes exactly Paragraph III of the complaint (the in *haac verba* pleading of 28 U.S.C. Section 1337), but omits (1) that portion of Paragraph IV which alleges that petitioner's certificate of public convenience and necessity was issued pursuant to the requirements of the Interstate Commerce Act; (2) that portion of Paragraph V which

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alleged that the Interstate Commerce Act required respondent to have a certificate of public convenience and necessity; and (3) the characterizations of respondent's activities in Paragraphs VI and VII as "unlawful". Thus respondent in summarizing the complaint has included the allegation of 28 U.S.C. Section 1337, but has left out the allegations that respondent violated the Act. This probably permits respondent's conclusions that "There is no allegation in the complaint that petitioner claims a right of action by virtue of any Act of Congress; . . ." and ". . . petitioner in its complaint and in the District Court claimed no federal right of action by virtue of any Act of Congress, . . ." (Br. p. 6). We submit, however, that the conclusions are unwarranted because they rest upon a complaint which respondent has "amended" to remove one-half of the jurisdictional allegations. This is so particularly because of the elementary rule of law (requiring, we think, no citation of authority) that upon a Motion to Dismiss (as here) all allegations of the complaint must be taken to be true.

Respondent's other contention with which we wish to deal briefly is that this Court in *Penna. R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121 and *Penna. R.R. Co.* v. *Sonman Coal Co.*, 242 U.S. 120, decided only that actions for violations of the Interstate Commerce Act might be asserted in state courts. Federal courts already had jurisdiction of such actions, contends respondent, because of the express grant of jurisdiction contained in Sections 8 and 9 of 49 U.S.C. But because Section 22 of 49 U.S.C. reserved common law remedies, respondent claims this Court held that section permitted actions for violation of the Act to be asserted in state courts (Br. 6-8).

We believe the answer to this argument is contained *in extenso* in the Petition (10-15). Suffice it to say here only that it is obvious this Court was not dealing with statutory violations in deciding the *Puritan* and *Sonman* cases. It was dealing with failures to perform common law duties. It *held* that such failures

were actionable in state courts and said by way of *dicta* that they were actionable in federal courts. But in both the *Puritan* and *Sonman* cases the dicta appear in non-diversity cases (Pet. App. C). This is a non-diversity case and, if the lower Courts were right, and if respondent is right (Br. p. 9), it also involves a complaint founded upon the common law.

Conclusion

For the reasons stated in the Petition, the Writ should issue.

Respectfully submitted,

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803 Public Service Bldg.,
Portland 4, Oregon,
Counsel for Petitioner.

March 30, 1955.

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HAROLD B. WILLEY

No. 631

IN THE

Supreme Court of the United States

October Term, 1954

CONSOLIDATED FREIGHTWAYS, INC., a corporation,
Petitioner,
vs.
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Respondent.
No. 631

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

No. 631

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Respondent submits that a review of this case on certiorari is not warranted as none of the considerations outlined in Rule 19 of this Court exist here. In consequence, it is our position that the petition should be denied and respondent spared any additional expense in defending this claim.

The motion to dismiss petitioner's complaint in the Oregon District Court was made on the basis that the

complaint did not show on its face that there was a substantial federal question at issue. It was on that basis that the District Court dismissed the action, and on that basis also that the Court of Appeals affirmed, although the opinion of the Court of Appeals went somewhat further in answering and disposing of the various contentions made by the petitioner before that Court. The effect of the decision of the Court of Appeals, arrived at by application of well settled holdings of this Court, is simply to deny the jurisdiction of the *federal* courts, and leaves petitioner free to pursue such rights as it may have in the appropriate state court.

Petitioner's complaint in the District Court contained only the following substance (Transcript of Record, pp. 3-6):

PARAGRAPH I. Plaintiff and defendant are both Washington corporations.

PARAGRAPH II. Plaintiff and defendant are both common carriers of property by motor vehicle in interstate commerce, subject generally to the jurisdiction of the Interstate Commerce Commission.

PARAGRAPH III. "That this action is brought and the jurisdiction of this Court is invoked under the general laws and rules relative to actions at law arising under the Constitution and laws of the United States, and particularly under the Interstate Commerce Act, as amended, which Act is an Act of Congress regulating commerce within the meaning of

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the Act of June 25, 1948 c. 646, 62 Stat., 931, 28 U.S.C.A. §1337, providing as follows: 'The District Courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.' "

PARAGRAPH IV. That plaintiff is and has been engaged in transportation of property in interstate commerce over U. S. Highway No. 30, between Boise, Idaho and Pendleton, Oregon, pursuant to Certificates of Public Convenience and Necessity issued to it by the Interstate Commerce Commission.

PARAGRAPH V. That defendant is and has been transporting property for compensation in interstate commerce over the same highway and between the same points, and that defendant has never held a Certificate of Public Convenience and Necessity to operate over such highway.

PARAGRAPH VI. The said operations of defendant are competitive with the licensed operations of the plaintiff and have wrongfully diverted traffic and revenues from the plaintiff.

PARAGRAPH VII. That plaintiff does not know the amount of revenues so diverted from it, but expects to determine this through use of the discovery procedures.

PRAYER. A demand for judgment against defendant "in such amount as may appear to be just

and reasonable as damages in the light of the evidence to be adduced in this proceeding."

No novel question is involved in the determination that the foregoing complaint does not disclose upon its face any substantial federal question at issue, nor is there any conflict between any of the Courts of Appeals on the subject. It has been uniformly held throughout the years by this Court that an action is not one "arising" under the Constitution, or laws of the United States or under the laws regulating commerce, so as to give Federal Courts jurisdiction in non-diversity cases, unless the action involves a real controversy between plaintiff and defendant concerning the validity, construction or effect of some such federal law or constitutional provision.

In *Gully vs. First Nat'l Bank*, 299 U. S. 109, 81 L. ed. 70, speaking through Justice Cardozo, this Court said:

> "How and when a case arises 'under the Constitution or Laws of the United States' has been much considered in the books. Some tests are well-established. To bring a case within the statute, a right or immunity created by the Constitution or Laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (citing cases). The right or immunity must be such that it will be supported if the Constitution or Laws of the United States are given one construction or effect, and defeated if they receive another (citing cases). A genuine and honest controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, un-

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aided by the answer or by the petition for removal."

In *Shulthis vs. McDougal,* 225 U. S. 561, 56 L. ed. 1205, the Court said:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Other cases so holding are:

Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186;

Western Union vs. Ann Arbor Ry., 178 U. S. 239, 44 L. ed. 1052;

South Covington Ry. Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;

Bell vs. Hood, 327 U. S. 678, 90 L. ed. 939.

The last-cited case of *Bell vs. Hood,* which is so heavily relied upon in appellant's brief, clearly reiterated this fundamental test, where the Court said:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and Laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction."

Another clearly established principle is that the existence of such a controversy between plaintiff and defendant concerning the validity, construction or effect of a Federal law must appear affirmatively from

the complaint alone, by distinct factual pleadings therein.

Gully vs. First National Bank, 299 U. S. 109, 81 L. ed. 70;
Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186;
South Covington Ry. Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;
Western Union vs. Ann Arbor Ry., 178 U. S. 239, 44 L. ed. 1052.

Tested by the foregoing principles, it seems apparent that petitioner's complaint fails to state any basis for Federal jurisdiction. There is no allegation in the complaint that the respondent claimed any right from the Interstate Commerce Commission to traverse U. S. Highway No. 30 which might make it necessary for the Court to interpret the Motor Carrier Act. For all that appears, respondent was a complete interloper.

There is no allegation in the complaint that petitioner claims a right of action by virtue of any Act of Congress; on the contrary, petitioner has relied throughout on what it deems is its common law right by virtue of a proposition stated in Section 710 of the Restatement of Torts (See Court of Appeals Transcript of Record, pp. 7-13).

Although petitioner in its complaint and in the District Court claimed no federal right of action by virtue of any Act of Congress, it did before the Court of Appeals and now does before this Court claim that an area of *federal* jurisdiction over a suit of this char-

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acter is created by the provisions of the Interstate Commerce Act as interpreted by this Court in the cases of *Penn. R.R. Co. vs. Sonman Coal Co.*, 242 U. S. 120, 61 L. ed. 188, and *Penn. R.R. Co. vs. Puritan Coal Co.*, 237 U. S. 121, 59 L. ed. 867 (Petition pp. 10-15). The fallacy of the reasoning by which petitioner arrives at this incorrect conclusion will undoubtedly be readily apparent to this Court.

Petitioner relies on a small portion of Section 22 of Part I of the Interstate Commerce Act (49 U.S.C. Sec. 22), which provides, "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The Motor Carrier Act, Part II of the Interstate Commerce Act, incorporated the whole of Section 22 of Part I by reference (49 U.S.C. Sec. 317 (b.)), but it should be observed, as the Court of Appeals clearly pointed out, that Section 22 principally and at great length details various kinds of restrictions which may not be imposed on the operational activities and rates of rail carriers. To contend that the above-quoted language buried in Section 22 created a new area of federal jurisdiction and granted new rights to sue in federal courts involves legal interpretation beyond our comprehension.

As before stated, petitioner, in arriving at this illogical result, relies on statements in the *Sonman Coal Co.* and *Puritan Coal Co.* cases to the effect that actions against interstate carriers for violations of the

Interstate Commerce Act could be prosecuted in either federal or state courts. In both of those cases, this Court only held that such suits might be prosecuted in state courts by virtue of the above-quoted portion of Section 22. Petitioner reads into those cases a delineation by this Court of a new area of federal jurisdiction; but what petitioner completely overlooks is that the federal courts already had an express congressional grant of jurisdiction over such suits against railroads by Section 9 of Part I of the Interstate Commerce Act (49 U.S.C. §9), where it provided,

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, *in any district court of the United States of competent jurisdiction* * * *" (Italics ours).

In other words, the federal courts expressly had jurisdiction of the actions involved in the *Sonman Coal Co.* and *Puritan Coal Co.* cases, and the language of this Court to the effect that such claims might be enforced "in either a federal or a state court" meant only that such claims could additionally be entertained in state courts.

Congress, in passing the Motor Carrier Act in 1935, did not provide for the recovery of damages for violations of the Act, as had theretofore been specifically provided as to railroads by Section 8 of Part I of the Act. Nor did Congress in the Motor Carrier Act grant

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any jurisdiction to district courts of the United States as to any actions arising under the Motor Carrier Act, as was specifically done as to railroads by Section 9 of Part I of the Act. Certain sections of Part I of the Act were incorporated into the Motor Carrier Act by direct reference, but Sections 8 & 9 of Part I are not among these. It is also most noteworthy that in 1940 Congress passed the Water Carrier Act as Part III of the Interstate Commerce Act and embodied therein as Section 308 (b.) & (c.) substantially the same language as Sections 8 & 9 of Part I of the Act, thereby specifically authorizing suits for damages in federal courts against water carriers who violated the Act (49 U.S.C. 908 (b.) & (c.)). Seemingly of controlling significance is the omission of any such provisions in the Motor Carrier Act in view of its intermediate enactment.

Since no cause of action such as stated by petitioner in its complaint was created by the Motor Carrier Act, petitioner's right, if it has any, is a common law right. Furthermore, no express grant of federal jurisdiction exists as to this type of action and, in consequence, federal jurisdiction could only exist in this non-diversity case if, upon the face of the complaint, it appeared that there was a substantial federal question to be determined in the litigation; and there is no such showing on the face of the complaint here. All of the foregoing conclusions were reached by the courts below simply by the application of well-settled principles.

CONCLUSION

On the basis that there is no new and important question of federal law to be settled in this case, that the decision of the Court of Appeals is not in conflict with any decision of this Court, and that the decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals, we urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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Counsel for Respondent.

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